IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JULY 16, 2008 Session

MELODY CURRY v. SAM B. CURRY

Direct Appeal from the Circuit Court for Davidson County
No. 05D-3501 Carol Soloman, Judge

No. M2007-02446-COA-R3-CV - Filed September 18, 2008

This is a divorce case. Husband/Appellant appeals the trial court's division of certain marital property, award of retroactive child support, award of Wife/Appellee's attorney fees, the standard for modification of the parenting plan and certain conditions imposed on him by the trial court. We affirm in part, reverse in part, and remand to the trial court for further proceedings consistent with this opinion.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed in Part, Reversed in Part and Remanded to the Trial Court

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which HOLLY M. KIRBY, J., and WALTER C. Kurtz, SR. J., joined.

Connie Ruguli, Brentwood, TN for Appellant

Audrey Lee Anderson, Nashville, TN for Appellee

OPINION

Appellee Melody Curry and Appellant Sam Bratton Curry were married on July 18, 2003. One child was born to the marriage. At the time of the marriage, Mr. Curry was employed at Mayer Electric, where he continues to work. Ms. Curry was two months from her high school graduation, and was working as a nanny and as a waitress. Following the marriage, the parties moved into a house owned by Mr. Curry.

In September 2004, Ms. Curry became pregnant with the parties' child. From December 2003 until the child was born on May 19, 2004, Ms. Curry worked as a secretary at Evan Glass.

After the child was born, Ms. Curry trained for work in the health care field and obtained a position at Vanderbilt.

In May of 2005, the parties separated, and Ms. Curry moved out of the marital home. Ms. Curry testified that she left the marital home due to Mr. Curry's violent temper. She also testified that Mr. Curry's rages triggered anxiety attacks, and that she was prescribed anti-anxiety medication. During the separation, Mr. Curry continued to reside in the marital home, and Ms. Curry lived in several different apartments. Ms. Curry continued to work at Vanderbilt until April of 2006. Thereafter, she obtained employment as a bartender, and also worked at the minor child's daycare center.

On September 26, 2005, Ms. Curry filed a Complaint for Divorce, alleging the ground of irreconcilable differences. On August 25, 2006, Ms. Curry was allowed to file an amended complaint to add the additional ground of inappropriate marital conduct on the part of Mr. Curry. In her amended complaint, Ms. Curry asked to be named the primary residential parent of the parties' child, for approval of her proposed temporary parenting plan, for *pendente lite* and permanent child support, and for her attorney's fees and costs.

On September 27, 2006, Mr. Curry filed his answer and counterclaim for divorce. Although Mr. Curry concedes that there were irreconcilable differences, he neither admits, nor denies inappropriate marital conduct on his part. In his counterclaim, Mr. Curry alleges that Ms. Curry was guilty of inappropriate marital conduct, asks to be named the primary residential parent, and asks for his reasonable attorney's fees. On December 8, 2006, Ms. Curry answered the counterclaim, denying any inappropriate marital conduct on her part.

The case was heard by the court on September 11, 2007. On October 4, 2007, the trial court entered its final order of divorce. Therein, the trial court found that "both parties [were] guilty of inappropriate marital conduct, however the Husband's guilt [was] much more serious than that of Wife." The order reads, in pertinent part, as follows:

> a. Wife shall be granted a divorce from Husband on the grounds of inappropriate marital conduct.
>
> * * *
>
> d. Mother is named the primary residential parent of the parties' minor child.

> e. Mother can return to the trial court and ask for a change in the Parenting Plan without the need to prove that there has been a material change in the circumstances.

The trial court divided the marital estate as follows:

> a. The marital equity in 7878 Rainey Drive is $60,000.00, and is to be split equally between the parties. Husband was given fifteen (15) days from the date of the hearing to decide if he would refinance and pay Wife her share, or sell the house to pay Wife her share. If Husband decides to sell, he shall use Linda Jones of Crye-Leike Realty, and Wife shall be allowed to participate in the sale of the property.
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> b. The Vanguard Group bank account with $23,729.90 is awarded to Husband as separate property.
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> c. The Vanguard Group account with $12,757.53 is marital property and shall be equally divided between the parties.
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> d. The Cornerstone account with $954.83 is awarded to Husband as separate property.
>
> e. The Husband's 401(k) is marital property and is to be divided by statute from the date of marriage through September 11, 2007, with each party receiving one-half of the value of the account for the stated period of time.
>
> f. The US Bank account used by Husband is marital property and $7,796.15 is the value that is attributed to the marital estate. That amount shall be equally divided between the parties.
>
> g. The 2002 Sequoia is marital property and should be awarded to Wife. Husband is ordered to pay within one (1) year from the date of entry of this Order to Wife $2,000.00 that will be used to deduct from the balance of the account.

In addition, the trial court entered judgement against Mr. Curry for retroactive child support in the amount of $7,176.00. The trial court arrived at this amount by taking the child support rate stated in the temporary parenting plan, multiplying that number by the prior twelve months, and

adding 12% statutory interest. Mr. Curry was also ordered to pay prospective child support of $598.00 per month beginning in September 2007. The trial court also awarded Ms. Curry attorney's fees in the amount of $6,716.73.

In its order, the trial court made a specific finding that Mr. Curry was not a credible witness. Based upon this finding, the trial court ruled that Ms. Curry could file a motion requesting an adjustment in child support if she was able to substantiate her allegation that Mr. Curry, in addition to his position at Mayer Electric, also owns a lawn-mowing business from which he receives income.

On October 18, 2007, Mr. Curry filed a motion to alter or amend the judgment. Specifically, Mr. Curry asserts that the trial court should have allowed his father, Steve Curry, to testify as a rebuttal witness in order to explain why the Vanguard account in the amount of $12,757.53 was separate property. In support of his motion, Mr. Curry attaches his father's affidavit explaining that the contributions made to this account were not employee contributions as categorized, but were gifts from Mr. Curry's grandmother. The trial court denied Mr. Curry's motion by order of December 17, 2007.

Mr. Curry appeals and raises seven issues for review as stated in his brief:

> I. Did the trial court abuse its discretion in the manner the hearing was conducted creating an unfair bias against the Husband?
>
> II. Did the trial court err in the property division by failing to consider that this was a short term marriage?
>
> III. Did the trial court err in awarding retroactive child support when the parties had agreed to commence the child support at the date of the final hearing and awarding relief not sought by Wife?
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> IV. Did the trial court err in awarding attorney's fees?
>
> V. Did the trial court err in changing the legal standard and procedure to modify a parenting plan?
>
> VI. Did the trial court err in not allowing the introduction of evidence on rebuttal or in the Motion to Alter or Amend?

VII. Did the court err in awarding relief not sought in the pleadings?

a. Did the court err in ordering [ ] retroactive child support?

b. Did the court err in ordering the Husband to attend 50 weeks of anger management?

c. Did the court err in ordering the Husband to use a specific real estate agent?

d. Did the court err in ordering that the child attend day care?

e. Did the court err in ordering the Husband to pay $2,000 for the alleged lapse in auto insurance?

Because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. ***See*** Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to observe the witnesses and their manner and demeanor while testifying is in a far better position than this Court to decide those issues. ***See McCaleb v. Saturn Corp***., 910 S.W.2d 412, 415 (Tenn.1995); ***Whitaker v. Whitaker***, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness' testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. ***See id.***; ***see also Walton v. Young***, 950 S.W.2d 956, 959 (Tenn.1997).

Bias

Mr. Curry first asserts that the trial judge's "continuous announcement of [her] opinions, interruptions of the witness and development of bias against [Mr. Curry]..." constitute an abuse of discretion. Consequently, Mr. Curry seeks a rehearing before an unbiased tribunal. In support of his contention, Mr. Curry specifically states that:

> The Court made several comments during the opening statements that could be interpreted as showing a bias against the Husband before any proof was presented. First, Wife's counsel complained that the Husband belittled her and said she couldn't even

vacuum the floor right. The Court interrupted by stating, **"Oh, but that's good. Say 'here you do it from now on.'"** When Wife's counsel was describing to the Court that the Husband purchased the house shortly before the marriage; the Court [] said **"So it's all marital."** Wife's counsel admitted that the Wife had an affair after she left the house and the Court interrupted and said, **"It's not to be considered...and he's got a huge amount of back child support."** Next Wife's counsel described that the Husband had purchased a truck during the separation; the Court interrupted and said **"I guess he realizes that his truck is marital property,"** Wife's counsel continued to describe the purchase of the Sequoia and the Court interrupted with **"Where does he work, besides the lawn-mowing business...it must be profitable."** And **"You got records...because the child support is two years of back support, whatever--"**

Husband's counsel started opening statements describing the marriage as a "short-term" marriage. The Court's first interruption was **"Well, I will be considering back child support to the date of separation, so I need to hear it."** Husband's counsel began describing the separate accounts the Husband had established prior to the marriage and the Husband's 401k and the Court interrupted with **"The 401k, by statute, she gets half."** Husband's counsel explained to the Court that she was "not finished yet." Husband's counsel asked the Court to restore the parties to the same position as if the marriage had never occurred consistent with the rule for short-term marriages.... The Court responded that she did not consider this a short-term marriage and that the Court of Appeals was referring to marriages that were **"three months or four months, you know, under a year"** .... Husband's counsel described the purchase of Husband's truck and the Court interrupted with, **"So I want to see whose [*sic*] owed what, what bank he borrowed it through, or otherwise, that's suspect. So I want to see the papers."** And **"If that truck is paid for it's a marital asset."**

* * *

[Wife] said that [Mr. Curry] had gotten mad at her...[and] he locked the child in a room upstairs. The Husband testified that he took the child upstairs to calm her down. The Court interjected with **"So he didn't love his child as much as he hated you."** And turned to Wife's counsel and said **"I got a good picture**."

* * *

When counsel asked the Wife if there had been improvements to the house, the Wife said a privacy fence was added and she helped to paint the nursery; the Court interjected **"Definitely decorated the bedroom."** Later during the trial, the Court commented on the testimony about the Husband being a great father by interjecting, **"But he hates her more, doesn't he?"** Then the Court stated, **"So, in other words–Let[] me see if I can get to where we are going. In order for him to have any time with his child, I've got to make sure that nothing upsets him or he won't behave properly; is that what I have to do."**

* * *

[Ms. Curry] stated that she would not object [to] the Husband's mother keeping the child on his days, and her mother keeping the child on her days. The Court then interjected and said, **"It won't be an issue. This child is going to day care."**

Before the Husband began his testimony, the Court announced that the Husband would have to go to anger management before the Court would approve the parenting plan. The Court continued to make interjections, such as telling the Husband **"Don't theorize"** and **"When did you stop beating your wife?"**

* * *

The Court continuously interrupted the Husband during his testimony about the alleged violence. Even telling the Husband **"put your ego aside, your self-centered[ness] aside, because it's not fair."**

Husband's counsel tried to question the Husband about the US bank account, asking the Husband how much money he had on deposit when they got married. The Court interrupted saying **"When you put her name on it, it is not a gift, it's marital property."**

* * *

The Husband testified to the Court that he purchased the house for $149,000...prior to the marriage. The mortgage payments did come out of his USBank account that he had added the Wife's name to, but she had never deposited her money into this account and after the separation she did nothing to contribute to the preservation or appreciation of the property. The Court interjected in the midst of the Husband's testimony with **"Well, you all were married."** Wherein, opposing counsel interjected, "Thank you, Judge." When

Husband's counsel posed a question to the Husband about limiting the Wife's interest, if any, in the home to the time she resided there, the judge interrupted the questioning saying, **"I'll take care of that"** not allowing the Husband to respond.

* * *

Husband's counsel asked him about the balance in his 401k at the date of the marriage.... Then counsel asked the husband the amount in the account at the date of separation. The Court interjected, **"Don't even bother..."** and the Husband was not allowed to respond....

* * *

The Court interrogated the Husband on the additional account and the Husband admitted that he could not answer her questions because he did nothing with the accounts, that his father handles the account. The Court replied, **"Whatever, whatever...I don't find this witness to be credible."**

* * *

Husband's counsel called the Husband's mother...to testify. While attempting to lay the foundation about who she was, the Court interrupted with, **"It's three-o'clock. You all were supposed to have taken three hours, that's what was scheduled. Get with it. And we know she's a kindergarten/first grade teacher, we know she's retired, we know that. Get to the point"** .... While Husband's mother was testifying about that she had not seen aggressive behavior from her son, the Court interjected, **"Well, that is so shocking. I'm sure you'd remember, right?"**

...When Wife was asked about her response to list all property that she considered to be marital, Wife's counsel objected with, "I'm going to object because the clients don't know the legalities...." The Court responded, **"First of all, she's not making a legal definition of marital property. She was objected to that anyway [sic], that is so unfair. I've told you before, that house is marital property."** Husband's counsel tried to bring to the court's attention that the Wife had claimed the marital residence, but not the other investment accounts or the 401k, the Court interrupted with **"Put it in, put it in, put it in."** Then the Court ceased the examination of the witness by saying, **"No further questions."**

* * *

At the close of proof, the Court stated, **"Does anybody want to make a closing?"** Wife's counsel stated, "If it's appropriate...." The Court replied, **"It's not..."**

(Emphasis in original) (citations to the record omitted).

At the outset, we note that Mr. Curry did not move the trial judge to recuse herself in this matter based upon his contention that she demonstrated bias and impartiality in hearing the case. This Court has held that motions to recuse "must be filed promptly after the facts forming the basis for the motion become known ... and the failure to seek recusal in a timely manner results in a waiver of a party's right to question a judge's impartiality." ***Davis v. State Dept. of Employment Sec.***, 23 S.W.3d 304, 313 (Tenn.Ct.App.1999). Because Mr. Curry has filed no motion for recusal, we must hold that he has waived such right in conjunction with the September 11, 2007 hearing . However, we note that Mr. Curry is not estopped from filing a motion for recusal should this case proceed further in Judge Soloman's court.

Although there was no motion for recusal, Mr. Curry, relying upon ***Radebaugh v. Radebaugh***, No. M2005-02727-COA-R3-CV, 2006 WL 3044155 (Tenn. Ct. App. June 29, 2006), asserts that the trial court's comments during the hearing constitute reversible error, or at least require remand to another judge for rehearing. We disagree. In ***Radebaugh***, a divorce case that was also heard by Judge Soloman, this Court determined that the judge's comments were sufficiently biased to warrant transfer to another judge on remand. It is true that litigants are entitled to the "cold neutrality of an impartial court" and have a right to have their cases heard by fair and impartial judges. ***Kinard v. Kinard***, 986 S.W.2d 220, 227 (Tenn. Ct. App.1998) (quoting ***Leighton v. Henderson***, 414 S.W.2d 419, 421 (1967)). To that end, a judge should recuse himself or herself if there is any doubt regarding the judge's ability to preside impartially, or if the judge's impartiality can reasonably be questioned. ***See State v. Hines***, 919 S.W.2d 573, 578 (Tenn.1995). Under Canon 3 of the Code of Judicial Conduct, a judge is required to recuse himself or herself when "the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding." Tenn. R. Sup. Ct. 10, Canon 3(E)(1)(a). However, not all bias and/or prejudice constitutes grounds for recusal and/or rehearing. As this Court explained in ***Caudill v. Foley***, 21 S.W.3d 203 (Tenn. Ct. App.1999):

> Bias and prejudice are only improper when they are personal. A feeling of ill will or, conversely, favoritism toward one of the parties to a suit are what constitute disqualifying bias or prejudice. For example, where a judge stated that he "could not stand" a certain law enforcement officer and would not accept cases initiated by him, it was found that his personal feelings and intense dislike of the officer were improper. However, neither bias nor prejudice refer to the attitude that a judge may hold about the subject matter of a lawsuit. That a judge has a general opinion about a legal or social matter that relates to the case before him or her does not disqualify the judge from presiding over the case. Despite earlier fictions to the contrary, it is now understood that judges are not without opinions when they hear and decide cases. Judges do have values, which cannot be

> magically shed when they take the bench. The fact that a judge may have publicly expressed views about a particular matter prior to its arising in court should not automatically amount to the sort of bias or prejudice that requires recusal.

Id. at 215 (citing Jeffrey M. Shaman et al., Judicial Conduct and Ethics § 4.04, at 101-02 (2d ed. 1995)) (footnotes omitted).

We have read the entire transcript of these proceedings, and have reviewed the allegedly biased comments in the context of the record as a whole. While we concede that some of Judge Soloman's comments do seem a bit brusque, not every comment by a judge that can be deemed improper requires recusal. During the course of a trial, a judge must be patient, dignified, and courteous to lawyers and witnesses while, at the same time, ensuring that the matter is adjudicated promptly and efficiently.[1] The manner in which a judge chooses to balance these requirements is largely left to the judge's own discretion. Although in this case Judge Soloman was never asked to recuse herself, the question of whether she should have done so is within her discretion. ***Wiseman v. Spaulding***, 573 S.W.2d 490 (Tenn. Ct. App.1978). Unless the grounds for recusal fall within those enumerated in Tenn. Const. art. 6, § 11 or Tenn. Code Ann. § 17-2-101 (1994), the decision to recuse rests within the sound discretion of the trial court and its decision will be upheld unless a clear abuse of discretion is established. . ***State v. Raspberry***, 875 S.W.2d 678, 681 (Tenn. Crim. App.1993). This standard of review requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. It is not proper for us to substitute our judgment for that of the trial court merely because we might have chosen another alternative. ***State ex rel. Vaughn v. Kaatrude***, 21 S.W.3d 244, 248 (Tenn. Ct. App.2000).

While we concede that some of Judge Soloman's comments were uncalled for in this case, those comments do not fall within the grounds for recusal enumerated in Tenn. Const. art. 6, § 11 or Tenn. Code Ann. § 17-2-101, nor do they rise to the level of personal bias towards Mr. Curry. Consequently, we do not find that the statements rose to such an egregious level as those found in ***Radebaugh***. We are unable to conclude that is was an abuse of discretion for Judge Soloman to hear the case.

Duration of Marriage and Division of Property

[1] Rule 10, Supreme Court Rules. Canon 3(B)(4) states that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity...." This duty, however, is balanced against the duty imposed by Canon 3(B)(8), which is to "dispose of all judicial matters promptly, efficiently, and fairly."

In making its division of property, the trial court must first classify the property. Tennessee recognizes two distinct types or classes of property, i.e., "marital property" and "separate property." The distinction is important because the relevant statutory provision, Tenn. Code Ann. § 36-4-121(a), "provides only for the division of marital property." ***See also Batson v. Batson***, 769 S.W.2d 849, 856 (Tenn. Ct. App. 1988). Tenn.Code Ann. § 36-4-121(b)(1) defines "marital property," in relevant part, as follows:

> (A) "Marital property" means all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage up to the date of the final divorce hearing and owned by either or both spouses as of the date of filing of a complaint for divorce....
>
> (B) "Marital property" includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage.

The General Assembly defines "separate property" as:

> (A) All real and personal property owned by a spouse before marriage, ...;
>
> (B) Property acquired in exchange for property acquired before the marriage;
>
> (C) Income from and appreciation of property owned by a spouse before marriage except when characterized as marital property under subdivision (b)(1);
>
> (D) Property acquired by a spouse at any time by gift, bequest, devise or descent;
>
> (E) Pain and suffering awards, victim of crime compensation awards, future medical expenses, and future lost wages; and

> (F) Property acquired by a spouse after an order of legal separation where the court has made a final disposition of property.

Tenn. Code Ann. § 36-4-121(b).

After classifying the property, the trial court must then divide the marital property equitably between the parties. Trial courts are afforded great discretion when classifying and dividing property, and their decisions are entitled to great weight on appeal. ***Sullivan v. Sullivan***, 107 S.W.3d 507, 512 (Tenn. Ct. App.2002). Accordingly, this Court's review of a trial court's marital property division is *de novo* upon the record, affording a presumption of correctness to the trial court's findings of fact. Tenn. R. App. P. 13(d). Dividing a marital estate is not a mechanical process; the goal is to fashion an equitable remedy by considering the factors set forth in Tenn. Code Ann. § 36-4-121(c) (2005), which factors include, but are not limited to, the following:

> (1) The duration of the marriage;
>
> (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
>
> (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
> (4) The relative ability of each party for future acquisitions of capital assets and income;
>
> (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
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> (6) The value of the separate property of each party;
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> (7) The estate of each party at the time of the marriage;
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> (8) The economic circumstances of each party at the time the division of property is to become effective;

> (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
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> (10) The amount of social security benefits available to each spouse; and
>
> (11) Such other factors as are necessary to consider the equities between the parties.

In reviewing the applicable factors, the Currys' marriage was clearly one of short duration. In such cases, it is appropriate to divide the property in a way that, as nearly as possible, places the parties in the same position as they were before the marriage. ***Batson v. Batson***, 769 S.W.2d 849, 859 (Tenn. Ct. App.1988). However, a division of marital property is rooted in equity, and it is not absolutely incumbent upon, nor is it usually possible, for a trial court to place the parties in exactly the same position as they found themselves prior to the marriage. A division of marital property is not rendered inequitable merely because it is not precisely equal. ***Cohen v. Cohen***, 937 S.W.2d 823, 832 (Tenn. 1996); ***Ellis v. Ellis***, 748 S.W.2d 424, 427 (Tenn.1988)). Neither does a property division become inequitable simply because each party does not receive a share or portion of each marital asset. ***Cohen v. Cohen***, 937 S.W.2d 833 (citing ***Brown v. Brown***, 913 S.W.2d 163, 168 (Tenn. Ct. App.1994)).

Mr. Curry asserts that the trial court erred in its division of marital property. Specifically, Mr. Curry contends that, because he came to the marriage with substantially more assets than Ms. Curry and that the parties were married only two years before the separation, the trial court should have restored the parties to their previous financial status as if the marriage had never occurred. Mr. Curry asserts that the trial court erred in finding that the following were marital assets subject to division: (1) the net equity in the marital home, (2) the increase in value of the 401(k) account during the marriage, (3) the $12,757.53 Vanguard account, and (4) the joint US Bank account balance as of the date of the separation. We will address each of these assignments of error in turn.

Marital Home

The record shows that Mr. Curry purchased the home for $147,000.00 in March 2003, four months before the parties' marriage. With a $20,000.00 gift from his parents, Mr. Curry paid $34,000.00 down. After the marriage, the parties paid the mortgage from their joint account at US Bank. Prior to the hearing, the property was appraised and determined to have a net equity of $94,000.00. In making its division of this asset, the trial court subtracted Husband's down payment

of $34,000.00 from the equity, then split the remaining $60,000.00 equally between the parties. Pursuant to the authority outlined above, we agree that Mr. Curry's contribution to the marital residence prior to the marriage (i.e., the down payment of $34,000) was separate property. However, under the same authority, any appreciation in the value of the home, or any equity accrued above and beyond the original down payment was correctly categorized as a marital asset. The trial court's division of the marital residence takes into consideration Mr. Curry's separate contribution and reserves that expenditure to him alone as separate property. It is undisputed that the remaining equity in the home accrued after the marriage; therefore, this portion of the equity is marital property and, as such, was properly divided between the parties. From the totality of the circumstances, and in light of the full marital property division, we cannot conclude that the trial court abused its discretion in equally dividing this asset.

401(k)

The record shows that Mr. Curry's 401(k) account had a balance of $2,915.59 at the time of the marriage. On the date of the divorce, the balance had increased to $56,288.65. In dividing this asset, the trial court subtracted the amount that was in the 401(k) account prior to the marriage, and split the remaining amount equally between the parties.

As the Tennessee Supreme Court noted in ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 749 (Tenn. 2002), "[r]etirement benefits accrued during the marriage clearly are marital property under Tennessee law." Based upon the foregoing authority, we conclude that any contributions made to the 401(k) by Mr. Curry prior to the marriage were correctly classified as his separate property. However, any amount contributed during the marriage, and any increase in the value of the 401(k) that accrued during the marriage is marital property. As such, the trial court was correct in devising an equitable division of same.

US Bank Account

The record indicates that this checking account was originally opened in Mr. Curry's name and was owned solely by him prior to the marriage. However, during the marriage, Ms. Curry was added as an owner of the account. Despite the fact that Mr. Curry was the primary wage earner during the marriage, Ms. Curry's contributions cannot be overlooked. The record shows that she did work during the marriage, that she cared for the minor child, and that she was primarily responsible for running the household. Any wages deposited by Mr. Curry into the joint checking account were marital assets under the above cited authority. The record also indicates that the monies were used by both parties during the marriage for their day-to-day expenses. At the time Mr. Curry closed the

account and removed Ms. Curry's name therefrom, the account had a balance of $7,796.15. We agree with the trial court that this amount was a marital asset. As such, we cannot conclude that the trial court erred in dividing it equally between the parties.

Vanguard Account

The trial court classified the $12,757.53 Vanguard account (ending in 0742) as marital property. This classification was based, *inter alia*, upon the fact that, in 2005, the statement for the account showed two deposits categorized as "employee contributions." The trial court found that, as such, the funds, totaling $600, had been "commuted" into the marital estate. As previously noted, the trial court made a specific finding that Mr. Curry was not a credible witness. In relation to the Vanguard account, the court specifically found that Mr. Curry had never disclosed its existence to Ms. Curry.

This court has recently stated that, separate property may become marital property if it has been "transmuted" into, or "commingled" with, marital property:

> [S]eparate property becomes marital property [by commingling] if inextricably mingled with marital property or with the separate property of the other spouse. If the separate property continues to be segregated or can be traced into its product, commingling does not occur .... [Transmutation] occurs when separate property is treated in such a way as to give evidence of an intention that it become marital property .... The rationale underlying these doctrines is that dealing with property in these ways creates a rebuttable presumption of a gift to the marital estate. This presumption is based also upon the provision in many marital property statutes that property acquired during the marriage is presumed to be marital. The presumption can be rebutted by evidence of circumstances or communications clearly indicating an intent that the property remain separate.

Galloway v. Galloway, No. M2004-02608-COA-R30-CV, 2007 WL 2198229, at *4 (Tenn. Ct. App. July 27, 2007).

From our review, it appears that the trial court intended to apply the doctrine of transmutation in this case (although the term "commuted" is used). Mr. Curry testified that he did not make employee contributions to this account during the marriage, and that he did not know why such contributions were categorized as "employee contributions." He further testified that he did not disclose this account to Ms. Curry, because he lacked knowledge of all of his accounts due to the fact

that his father, Steve Curry, acted as his accountant and managed his investments. At the hearing, Mr. Curry attempted to call his father as a rebuttal witness. This was not allowed because Mr. Curry's father had remained in the courtroom throughout the proceedings in violation of the rule of sequestration.

In his motion to alter or amend, Mr. Curry asserts that his father was improperly excluded as a witness. We disagree. However, as exhibits to his motion, Mr. Curry attached bank statements for the Vanguard account from 2002 through 2007. Although not clear, it appears that the contributions made during the parties' marriage may not have been employee contributions, but may have been gifts to Mr. Curry from his family. Consequently, we conclude that the trial court should have delved deeper into the nature of the contributions to this account. Although Mr. Curry's father was properly excluded as a witness based upon the violation of the sequestration rule, the documents provided by Mr. Curry may shed light on the origin of the two "employee contributions" made in 2005, and may help to determine whether this account was transmuted into a marital asset. We remand this issue to the trial court for further inquiry.

Retroactive Child Support

Mr. Curry asserts that he trial court erred in awarding retroactive child support for the prior twelve months in the amount of $7,176.00. Specifically, Mr. Curry contends that the parties entered into an agreed parenting plan during mediation in January 2007. The agreement specifically states that the child support payment of $598.00 would start the first day of the month following the final hearing. Mr. Curry argues that the parties agreed to this plan, and that it was error for the trial court to assess retroactive child support in contravention of the parenting plan. In the alternative, Mr. Curry argues that the twelve month period is arbitrary, and that the trial court failed to take into account his contributions towards the child's day care expenses.

The Tennessee Supreme Court has stated that the child is the beneficiary of the child support payments made by the non-custodial parent. ***Rutledge v. Barrett***, 802 S.W.2d 604, 607 (Tenn. 1991). Therefore, as a general rule, the custodial parent may not waive the minor child's right of support. ***Norton v. Norton***, No. W1999-02176-COA-R3-CV, 2000 WL 52819, at *4 (Tenn. Ct. App. Jan. 10, 2000). In keeping with this precept, we have held that "agreements, incorporated in court decrees or otherwise, which relieve a natural or adoptive parent of his or her obligation to provide child support are void as against public policy as established by the General Assembly." ***Witt v. Witt***, 929 S.W.2d 360, 363 (Tenn. Ct. App. 1996).

When parties stipulate to the amount of child support to be paid, the stipulation must be reviewed by the trial court for approval. Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(i). Furthermore, "if the negotiated agreement does not comply with the [Child Support] Guidelines or contain the findings of fact necessary to support a deviation, the tribunal shall reject the agreement." Tenn. Comp. R. & Regs. 1240-2-4-.01(2)(b)(1)(ii). Thus, trial courts do not have the discretion to approve a private agreement for child support in contravention of the guidelines and state law. ***See, e.g., State ex rel Rushing v. Spain***, No. W2005-00956-COA-R3-CV, 2005 WL 2922440, at *1

(Tenn. Ct. App. Nov. 4, 2005); ***State ex rel. Mitchell v. Armstrong***, No.W2003-01687-COA-R3-JV, 2004 WL 2039811, at *4 (Tenn. Ct. App. Sept. 3, 2004).

The agreement between the parties relieves Mr. Curry of his child support obligation until the month following the entry of the final decree of divorce. In Tennessee, biological parents, even without a court order, have both a statutory and common law obligation to support their children if they have the ability to do so. Tenn. Code Ann. § 34-1-102(a); ***Smith v. Gore***, 728 S.W.2d 738 (Tenn. Ct. App.1987). Mr. Curry is obligated to support the minor child and any agreement between the parties to relieve that obligation (even short-term) is void, *ab initio*, as it usurps the child's right to the support. Because the agreement between these parties relieves Mr. Curry of his support obligation pending final outcome of the case, that portion of the agreement is in direct contravention of the Tennessee Child Support Guidelines, and the statutory and common law. Consequently, the trial court correctly determined that Mr. Curry owed retroactive child support in this case. The question, then, is whether the amount and/or length of retroactive support was reasonable under the facts.

The testimony in the record supports a finding that the parties were operating under the temporary parenting plan for at least twelve months prior to the final hearing. As such, the twelve month period is not arbitrary. Rather, this time frame "makes up" for those months that Mr. Curry was incorrectly relieved of his obligation to support his child. That being said, we do not intend to imply that Mr. Curry financially abandoned the minor child. The record indicates that Mr. Curry did pay some amount of support while the parties were operating under the temporary parenting plan. However, the exact amount is very much disputed. Mr. Curry asserts that he made "considerable monetary contributions" after the separation. Ms. Curry either disputes the alleged payments and/or asserts that they were made prior to the parties' entry into the temporary parenting plan. The trial court's determination of the amount of retroactive child support constitutes a finding of fact to which we must defer absent a contrary preponderance of the evidence or an error of law. We have reviewed the entire record, and we conclude that the evidence supports a finding that the amount of $7,176.00 was within the range of reasonableness, and that the time period of twelve months was not arbitrary. Consequently, we are unable to conclude that the trial court erred in determining retroactive child support.

Attorney's Fees

Mr. Curry argues that the trial court abused its discretion in awarding Ms. Curry her attorney's fees. In divorce cases, an award of attorney's fees is treated as an award of alimony *in solido*. ***Eldridge v. Edlridge***, 137 S.W.3d 1, 24-25 (Tenn. Ct. App. 2002). Accordingly, when making such an award, the trial court must consider the factors set out at Tenn. Code Ann. § 36-5-121(h)(3)(i).[2] Of these factors, the need of the party seeking alimony and the ability of the

[2] The statute provides:

(continued...)

other party to pay are the most important. ***See, e.g., Loyd v. Loyd***, 860 S.W.2d 409 (Tenn. Ct. App. 1993). Awards of attorney fees are within the sound discretion of the trial court, and will not be disturbed on appeal unless the evidence preponderates against the award. ***Kincaid v. Kincaid***, 912 S.W.2d 140, 144 (Tenn.Ct.App.1995).

In awarding Ms. Curry her attorney's fees, the trial court specifically found that Mr. Curry had the ability to pay this support, and that Ms. Curry had need of the same. We have reviewed the record in light of all relevant facts, including need and ability to pay. From the totality of the circumstances, we conclude that the trial court did not abuse its discretion in awarding Ms. Curry attorney's fees in this case.

Legal Standard to Modify Parenting Plan

Concerning future modification of the parenting plan, the trial court held, in pertinent part that:

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[2](...continued)

> (i) In determining whether the granting of an order for payment of support and maintenance to a party is appropriate, and in determining the nature, amount, length of term, and manner of payment, the court shall consider all relevant factors, including:(1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;(2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;(3) The duration of the marriage;(4) The age and mental condition of each party;(5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;(6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage; (7) The separate assets of each party, both real and personal, tangible and intangible; (8) The provisions made with regard to the marital property, as defined in § 36-4-121;(9) The standard of living of the parties established during the marriage;(10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;(11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and(12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

> IT IS FURTHER, ORDERED, ADJUDGED, AND DECREED the Mother, Melody Curry, can return to the Court and ask for a change to the Parenting Plan without the need to prove that there has been a material change in the circumstances.

Tenn. Code Ann. § 36-6-101(a)(2) provides, in relevant part:

> (B) If the issue before the court is a modification of the court's prior decree pertaining to custody, ***the petitioner must prove by a preponderance of the evidence a material change in circumstance***. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.
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> * * *
>
> (C) If the issue before the court is a modification of the court's prior decree pertaining to a residential parenting schedule, ***then the petitioner must prove by a preponderance of the evidence a material change of circumstance affecting the child's best interest***. A material change of circumstance does not require a showing of a substantial risk of harm to the child. A material change of circumstance for purposes of modification of a residential parenting schedule may include, but is not limited to, significant changes in the needs of the child over time, which may include changes relating to age; significant changes in the parent's living or working condition that significantly affect parenting; failure to adhere to the parenting plan; or other circumstances making a change in the residential parenting time in the best interest of the child.

Id. (emphasis added).

The trial court's ruling on modification of the parenting plan relieves Ms. Curry of her evidentiary burden to show by a preponderance of the evidence a material change in circumstance sufficient to require a modification of the parenting schedule. The trial court lacks the authority to modify this evidentiary standard. Consequently, we reverse this portion of the trial court's order. If Ms. Curry deems it necessary to modify the existing parenting schedule, then she must be held to the statutory evidentiary standard. This burden enables the trial court to sufficiently review the particular circumstances of each case, and to determine whether a change in the parenting schedule is truly in the best interest of the child.

Relief Not Sought In Pleadings

Mr. Curry asserts that the trial court erred in awarding various forms of relief, which were allegedly not sought in Ms. Curry's pleadings. Specifically, Mr. Curry takes issue with the trial court's (1) award of retroactive child support, (2) requirement that Mr. Curry attend anger management, (3) order to use a specific real estate agent, (4) order for the child to attend day care, and (5) order that Mr. Curry pay $2,000 for the lapse in car insurance. We have previously addressed the award of retroactive support. The remaining points of error fall within the trial court's discretion. The abuse of discretion standard requires us to consider: (1) whether the decision has a sufficient evidentiary foundation; (2) whether the trial court correctly identified and properly applied the appropriate legal principles; and (3) whether the decision is within the range of acceptable alternatives. While we will set aside a discretionary decision if it does not rest on an adequate evidentiary foundation or if it is contrary to the governing law, we will not substitute our judgment for that of the trial court merely because we might have chosen another alternative. ***State ex rel. Vaughn v. Kaatrude***, 21 S.W.3d 244, 248 (Tenn. Ct. App.2000). Applying this standard, we turn to the disputed rulings.

Real Estate Agent

At the close of proof, the trial court made the following, relevant statements concerning the use of a real estate agent:

> Let me give you a realtor's name by the name L[i]nda Jones, who is really good – good realtor with Crye-Leike, she can move those houses quickly.

Had the trial court simply mentioned a realtor's name, this alone would not constitute reversible error as it is not unusual for a trial court to order the parties to use a real estate agent for the sale of a parcel of real property. ***See, e.g., Roberts v. Roberts***, 767 S.W.2d 646, 647 (Tenn. Ct. App. 1988). However, here the trial court exceeded its authority by mandating, in its final order that the parties use Ms. Jones, to wit:

> In the event that Husband decides to sell the house, he shall use Linda Jones at Crye-Leike Realty and the Wife shall be allowed to participate in the sale of the property and both parties will cooperate in facilitating the sale of the property in order to equitably divide this asset.

There is no indication in this case that there was such a level of disagreement as to the sale of the marital residence that the trial court was required to assign a particular real estate agent to facilitate the disposition of this asset. Consequently, we conclude that the trial court abused its discretion in mandating that the parties use Ms. Jones as their agent. Therefore, we reverse this portion of the order. However, we leave undisturbed the trial court's ruling that both parties have the right to participate in the sale of the marital residence, and that both will cooperate in that endeavor.

Day Care

Concerning child care, the record shows that both parties rely upon their parents to help with the daily care. Both parties indicate that they have no issue with the other party's parents providing such care. From the record, the child has previously attended daycare, and Ms. Curry asserts her preference that the child be enrolled in preschool in order to learn how to socialize and to prepare for kindergarten. This decision is largely a matter of fact finding, and requires a determination of what is in the best interest of this child. In reviewing the record, we cannot conclude that the evidence preponderates against the trial court's decision that the child should attend preschool.

Anger Management

The trial court ordered Mr. Curry to attend a "program of fifty-two (52) weeks of anger management including behavioral treatments...." Mr. Curry asserts that this ruling was incorrect. We disagree. In reaching its decision, the trial court specifically found that Mr. Curry's temper was "horrible and that he shows it when the child is present...." The record provides support for this finding.

During the trial, Ms. Curry, two of her friends, and her mother testified regarding different times when Mr. Curry engaged in acts of rage. It is not necessary to restate all of the testimony concerning this egregious behavior. Suffice it to say that the evidence in the record supports a finding that Mr. Curry has verbally assaulted Ms. Curry and has exhibited rash behavior. Mr. Curry admits to at least some of these allegations. Perhaps more troubling than the behavior itself, is the fact that Mr. Curry displayed this conduct in the presence of the child. A trial court has broad discretion to take necessary action in order to "protect the welfare of the child or a party." Tenn. Code Ann. § 36-6-404(a)(4)(F). The record is rife with evidence to support the trial court's determination that Mr. Curry is in need of anger management.

Auto Insurance

The trial court awarded Ms. Curry a $2,000.00 judgment against Mr. Curry for the lapse in auto insurance. This shortfall was properly classified as marital debt. The trial court has the authority to apportion marital debt in the same way that the assets are divided. In distributing the marital debts in an equitable fashion, the court should consider the following: (1) which party incurred the debt, (2) the purpose of the debt, (3) which party benefitted from incurring the debt, and (4) which party is better able to repay the debt. ***Smith v. Smith***, 93 S.W.3d 871, 880 (Tenn. Ct. App. 2002). Both the division of marital property and the division of marital debt is within the trial court's discretion. ***Id***.

The trial court determined that Ms. Curry's vehicle was marital property, and ordered her to be responsible for the car note. Since the car was a marital asset, during the course of the marriage, both parties would have shared responsibility for the car insurance. Taking the relevant factors into consideration we conclude that the trial court did not abuse its discretion in ordering Mr. Curry to reimburse Ms. Curry for the car insurance.

Ms. Curry requests this Court to award her attorney's fees for defending this appeal. In our discretion, and considering the entire record, we deny this request. Each party is responsible for his or her attorney's fees and costs incurred in this appeal.

Based upon the foregoing, we reverse the trial court's order as to the $12,757.53 Vanguard Account, Ms. Curry's evidentiary burden of proof concerning modification of the parenting schedule, and the trial court's requirement that the parties use a particular real estate agent. We remand this matter for further proceedings consistent with this opinion, and specifically for determination of the correct classification and division of the Vanguard Account. We affirm the trial court on all other issues raised by the Appellant. Costs of this appeal are assessed one-half to Appellant Sam Bratton

Curry and his surety, and one-half to Appellee Melody Curry, for which execution may issue if necessary.

J. STEVEN STAFFORD, J.